In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1162

RICHARD MATHER BOARDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1969 (2 R. 22). On December 18, 1969, Mr. Justice Brennan extended petitioner's time for filing a petition for a writ of certiorari until

February 9, 1970, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the requirement of the Selective Service Act that registrants conscientiously opposed to military service render civilian service in its stead unconstitutionally abridges their religious liberty.

2. Whether petitioner had a right to have the jury instructed that it should acquit if it believed that his refusal to report for alternative civilian service had been conscientiously motivated.

3. Whether the jury should have been informed that it had the power to acquit petitioner even if he was guilty of the statutory offense.

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the District of Massachusetts of willfully failing to comply with an order of his local draft board directing him to report for civilian work in lieu of induction, in violation of 50 U.S.C. App. 456(j) and 462. On April 21, 1969, he was sentenced to three years' imprisonment (1 R. 7). The court of appeals affirmed.

The undisputed evidence showed that petitioner, a registrant whose claim to conscientious objector status (Class I-O) had been duly recognized by his local board, deliberately disobeyed an order of the board, issued in accordance with the Selective Serv-

ice Act and regulations, directing him to report for civilian hospital work in lieu of induction. Petitioner's stated reason for so refusing, articulated in letters to the board, was that the entire Selective Service System, including the Act's provisions for alternative service for registrants conscientiously opposed to military service, was offensive to his religious convictions (Pet. App. B; 1 R. 116). Those convictions, he said, precluded him from cooperating with the System in any manner, even to the extent of taking advantage of the provisions for such alternative service (Pet. 5; Pet. App. A2).

ARGUMENT

1. There is no merit in petitioner's claim that the requirement of the Selective Service Act that those conscientiously opposed to military service render civilian service in its stead unconstitutionally abridges the religious liberty of such registrants (Pet. 8-12). The substance of this contention has repeatedly been rejected. *O'Connor* v. *United States*, 415 F. 2d 1110, 1111 (C.A. 9), certiorari denied March 2, 1970, No. 1285 Misc., this Term; *Richter* v. *United States*, 181 F. 2d 591 (C.A. 9), certiorari denied, 340 U.S. 892; *United States* v. *Henderson*, 180 F. 2d 711 (C.A. 7), certiorari denied, 339 U.S. 963; *Atherton* v. *United States*, 176 F. 2d 835, 842 (C.A. 9), certiorari denied, 338 U.S. 938; *Kramer* v. *United States*, 147 F. 2d 756 (C.A. 6), certiorari denied, 324 U.S. 878; *Rase* v. *United States*, 129 F. 2d 204, 210 (C.A. 6). This Court has often recognized that "[t]he conscientious

objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him." *United States* v. *Macintosh*, 283 U.S. 605, 623;[1] cf. *In re Summers*, 325 U.S. 561, 572-573; *Hamilton* v. *Regents*, 293 U.S. 245, 263-264; *Jacobson* v. *Massachusetts*, 197 U.S. 11, 29. Congress, therefore, clearly has the power to condition the grant of exemption on the performance of a less burdensome form of service. *George* v. *United States*, 196 F. 2d 445, 450 (C.A. 9), certiorari denied, 344 U.S. 843; *Kramer* v. *United States*, *supra*, 147 F. 2d at 758-759. Moreover, even if it be assumed, *arguendo*, that the First Amendment requires some form of exemption for registrants who are conscientiously opposed to military service, it would not follow, as petitioner argues, that the exemption must be total and unconditional. In exercising its broad power to take all steps necessary and proper to raising and supporting an army (*United States* v. *O'Brien*, 391 U.S. 367, 377), Congress, as the court of appeals pointed out (Pet. App. A3), can legitimately require alternative civilian service from conscientious objectors for such valid legislative purposes as to alleviate the unfairness that would result if registrants so classified continued to enjoy the benefits of wholly unsupervised civilian life while other registrants were

[1] The dissent in *Macintosh* did not question the stated principle (see *In re Summers*, 325 U.S. 561, 572-573), nor did *Girouard* v. *United States*, 328 U.S. 61, in which *Macintosh* was overruled on another issue.

required to submit to the hardships and hazards of conscription (cf. *Braunfeld* v. *Brown*, 366 U.S. 599, 608-609), to prevent the threat to the morale of those conscripted which a grant of total CO exemption might well entail (cf. *Howze* v. *United States*, 272 F. 2d 146, 148 (C.A. 9)), and to facilitate solution of the formidable problem of distinguishing genuine from fraudulent claims to the privileged status (cf. *Weightman* v. *United States*, 142 F. 2d 188, 191-192 (C.A. 1)).

2. Equally invalid is the contention of petitioner that he had a right to have the jury instructed that it should acquit if it believed that his refusal to report had been conscientiously motivated (Pet. 16-20). Such an instruction would have fundamentally confused the notions of motive and intent. Criminal intent, the only mental element required to be proved, is the willful and deliberate purpose to do what a valid law forbids (or, as here, to abstain from doing what is commanded). Cf. *Morissette* v. *United States*, 342 U.S. 246, 250-263; *Browder* v. *United States*, 312 U.S. 335, 341-342; *Ellis* v. *United States*, 206 U.S. 246, 257; *United States* v. *Moylan*, 417 F. 2d 1002, 1004-1005 (C.A. 4), certiorari denied February 24, 1970, No. 885, this Term. That petitioner acted with such deliberate purpose was here plainly established, as he acknowledges. The question *why* the accused did what he did is irrelevant to the issue of guilt or innocence. *United States* v. *Moylan*, *supra*; *United States* v. *Henderson*, 180 F. 2d 711, 716 (C.A. 7), certiorari denied, 339 U.S. 963; *United*

States v. *Madole*, 145 F. 2d 466, 467-468 (C.A. 2); 1 Wharton, *Criminal Law and Procedure* (Anderson ed. 1957), § 64. It is pertinent, at most, to the sentencing process. The notion that prohibited conduct may be committed with impunity if the accused believes it morally or religiously justified was said in *United States* v. *Madole*, *supra*, in an identical context, not to merit discussion. As this Court observed in *Ellis* v. *United States*, *supra*, 206 U.S. at 257, "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

3. Nor is there substance to petitioner's claim that the jury should have been told that it had the power to acquit him even though he was guilty of the offense charged (Pet. 13-16). *Berra* v. *United States*, 351 U.S. 131, 134; *Horning* v. *District of Columbia*, 254 U.S. 135, 138-139; *Hepner* v. *United States*, 213 U.S. 103, 114; *Sparf and Hansen* v. *United States*, 156 U.S. 51, 101-103; *United States* v. *Moylan*, *supra*, 417 F. 2d at 1005-1007. That the jury has the power to bring in a verdict "in the teeth of both law and facts" (*Horning* v. *District of Columbia*, *supra*, 254 U.S. at 138) does not mean, as Judge Sobeloff observed in *United States* v. *Moylan*, *supra*, that the jury should be encouraged in such lawlessness (417 F. 2d at 1006). "[J]urors may have the power to ignore the law," as the court below noted, "but their duty is to apply the law as interpreted by the court, and they should be so instructed" (Pet. App. A10).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1970.

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